83-1213

No.

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IN THE

# SUPREME COURT OF THE UNITED STATES

October Term, 1983

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**COMMONWEALTH OF KENTUCKY** - **Petitioner**

*versus*

**VONDLE LEE HAMILTON** - - - **Respondent**

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Petition for a Writ of Certiorari to the
Supreme Court of Kentucky

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## BRIEF FOR PETITIONER, WITH APPENDIX

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Petitioner, Commonwealth of Kentucky, respectfully prays that a Writ of Certiorari issue to review the Opinion of the Supreme Court of Kentucky rendered August 31, 1983 only to the extent that said Opinion reversed and remanded the judgment finding respondent guilty of incest. A petition for rehearing filed by petitioner was denied by the Supreme Court of Kentucky in an order entered November 23, 1983.

## I.

## THE QUESTION PRESENTED FOR REVIEW

**Whether the Supreme Court of Kentucky misapplied the holding in *Blockburger* v. *United States*, 284 U. S. 299, 52 S. Ct. 180, 76 L. Ed. 306 (1932), when it ruled that the respondent's convictions of rape and incest which arose from a single act of sexual intercourse with his then ten (10) year old daughter constituted a violation of the respondent's constitutional guarantee against double jeopardy?**

## PARTIES TO THE PROCEEDING

The caption of the case contains the names of all parties to the proceeding in the Court whose judgment is sought to be reviewed. In addition it should be pointed out that Pauline Hamilton, the wife of the respondent herein, was jointly tried with respondent for rape and incest and found guilty. Her appeal was briefed separately, however, and her sentence on both the rape and incest charges was reversed in a separate opinion also entered by the Supreme Court of Kentucky on August 31, 1983.

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No.

IN THE

# SUPREME COURT OF THE UNITED STATES

October Term, 1983

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COMMONWEALTH OF KENTUCKY - - *Petitioner*

*v.*

VONDLE LEE HAMILTON - - - *Respondent*

---

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF KENTUCKY

---

## BRIEF FOR PETITIONER, WITH APPENDIX

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### REFERENCE TO OPINIONS

The Opinion of the Supreme Court of Kentucky, File No. 82-SC-671-MR, affirming the respondent's conviction for rape and reversing the respondent's conviction for incest was rendered on August 31, 1983 and is published at *Hamilton* v. *Commonwealth*, Ky., 659 S. W. 2d 201 (1983). This Opinion may be found at Appendix 1a-10a. The Order denying the petitioner's petition for rehearing was entered on November 23, 1983 and may be found at Appendix 11a.

### STATEMENT OF JURISDICTION

The Opinion of the Supreme Court of Kentucky was rendered in a published opinion on August 31,

1983. Rehearing was denied in an order entered November 23, 1983.

Jurisdiction is conferred upon this Court to review by writ of certiorari the appellate opinion in question by 28 U.S.C. Section 1257(3). This Court should grant the writ of certiorari under the authority of Rules 17.1(b) and (c) of this Court.

Rule 17.1(b). The Supreme Court of Kentucky, in ruling that the Double Jeopardy Clause of the United States Constitution prohibits the respondent's conviction of both rape and incest resulting from a single act of sexual intercourse, has decided a federal question in a way in conflict with a decision of another State Court.

Rule 17.1(c). The Supreme Court of Kentucky has misapplied the holding in this Court's Opinion of *Blockburger* v. *United States,* 284 U. S. 299, 52 S. Ct. 180, 76 L. Ed. 306 (1932).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Petitioner asserts that there is no constitutional authority to justify the result of the Supreme Court of Kentucky in reversing the incest conviction and in remanding the case to the lower court with directions to set aside the incest conviction. Such absence of authority involves reference to:

The Fifth Amendment, Constitution of the United States

The Fourteenth Amendment, Constitution of the United States

Kentucky Revised Statutes 510.040, 530.020, 505.020

The full text of this authority is set forth at Appendix, pp. 12a-15a.

## STATEMENT OF THE CASE

References herein will be to the transcript of evidence of the original trial, hereinafter referred to as "TE", as well as to the transcript of record, hereinafter referred to as "TR". These transcripts are not presently before this Court. Reference will also be made to the Opinion of the Supreme Court of Kentucky Affirming in Part and Reversing in Part and Remanding rendered on August 31, 1983 and to the Order denying the petition for rehearing rendered on November 23, 1983. These documents can be found in the Appendix, pp. 1a-11a.

On September 15, 1981, the Pike Circuit Court Grand Jury returned Indictment No. 81-CR-132 against Vondle Lee Hamilton and his wife Pauline Hamilton [codefendant] (TR 4-5). Both defendants were charged with the crimes of first degree rape and of incest of their daughter Sue Ann Hamilton at some unspecified date in 1981 (TR 4). The third count of the indictment charged respondent alone with being a persistent felony offender in the second degree.

Glenda Sue Thacker, the respondent's sister, testified that Pauline Hamilton told her that the respondent had gotten drunk and admitted to her that he had sex with Sue Ann. (TE 24). Mrs. Thacker also stressed that Sue Ann was eleven (11) years old at the time of trial but was only ten (10) years old at the time this

was taking place. (TE 25). Draxie Keene, the respondent's mother, as well as Roy Hamilton confirmed that Pauline Hamilton said that the respondent had sex with Sue Ann and made her watch. (TE 188, 203).

Sue Ann Hamilton was found competent to testify. At trial Sue Ann Hamilton admitted that sometime last year her father did something to her that she felt he should not have done (TE 93). She testified that it happened at home and that her brothers, Rocky, Scottie, Randy, and Billy were present (TE 93). Sue Ann acknowledged that her father put a part of his body into her between her legs (TE 94). The act occurred in the respondent's bedroom (TE 95). Sue Ann also knew that the part of the anatomy that the petitioner, the Commonwealth, was referring to was part of a man's body between his legs (TF 96). Sue Ann denied that anyone else had done this act to her (TE 96). Sue Ann did admit that her dad, her brothers, and her uncles have all felt her between her legs (TE 96). Her father however was the only person that put part of his body in her (TE 97). Sue Ann also acknowledged that her mother (Pauline Hamilton) told her not to tell on the respondent and to tell that it did not happen (TE 98).

On cross-examination by the respondent's attorney, Sue Ann again acknowledged that the respondent put that part of his body between his legs in her (TE 103). Sue Ann testified that the respondent told her to remove her clothes while she was in his bedroom (TE 104). Sue Ann also noted that the respondent explained to her that if she did certain things she could

have a baby by showing her what he looked like naked and what she looked like naked (TE 105).

Dr. David K. Mulliken testified that Sue Ann had a vaginal opening consistent with sexual intercourse and that it was his opinion that she had sexual intercourse over some period of time prior to the examination (TE 120).

The respondent testified and denied having sex with Sue Ann (TE 268). The respondent admitted, however, showing Sue Ann his parts and attempted to tell her that she could get herself in trouble by becoming pregnant (TE 270-271). The respondent on direct examination by Pauline Hamilton's attorney acknowledged that he asked Pauline to bring Sue Ann into his bedroom (TE 280). On cross-examination by the petitioner, the respondent acknowledged that he asked Sue Ann to strip off her clothes when she came into his bedroom (TE 292). The respondent also acknowledged that he heard that Donnie West, a retarded boy, had overheard the respondent in the bedroom with Sue Ann (TE 293).

The respondent's motion for a directed verdict and motion for setting aside the jury were overruled by the trial court. Objections to instruction number one and instruction number three on the ground that incest merged into the greater offense also were overruled (TE 328).

After instructions were given, the jury deliberated and found Pauline Hamilton and the respondent guilty of first degree rape and fixed their punishment at life in the penitentiary. The jury also found Pauline Ham-

ilton and the respondent guilty of incest and fixed their punishment at ten years in the penitentiary. The PFO charge as to the respondent was thereupon dismissed since such a conviction would not enhance his sentence (TE 377).

In an appellate brief filed January 26, 1983 in the Supreme Court of Kentucky, respondent contended in his third issue that the trial court erred and violated his constitutional guarantee against double jeopardy as well as his right to be free from multiple prosecution by permitting him to be convicted of incest as well as first degree rape.

In a published opinion rendered August 31, 1983, the Supreme Court of Kentucky affirmed the judgment finding the respondent guilty of the rape and reversed that part of the judgment finding the respondent guilty of incest.

In so reversing the incest conviction, the Supreme Court of Kentucky in its majority opinion noted the following as is applicable to this petition:

> However, the *Blockburger* [*Blockburger* v. *United States,* 284 U. S. 299, 52 S. Ct. 180, 76 L. Ed. 306 (1932)], test is not to be applied in the abstract, so that we merely look at the statute standing alone. The test must be applied subjectively. When we view the present case, we find that the proof utilized to convict the appellant [respondent] of rape was that he had sexual intercourse with a ten year old child, who was, in actuality, his daughter. The only additional fact — the relationship of father/daughter — was required in the incest charge. Thus, in a sense, the additional fact

was not present in 'each' case, as required by *Blockburger,* but in only one case. (Appendix at 3a).

A petition for rehearing was filed by the Commonwealth on September 20, 1983. In an order dated November 23, 1983, the Supreme Court of Kentucky denied the petitioner's petition for rehearing. (Appendix at 11a).

## ARGUMENTS AND REASONS FOR GRANTING THE WRIT OF CERTIORARI

**By Holding That the Respondent's Convictions of Rape and Incest Constituted a Violation of the Respondent's Constitutional Guarantee Against Double Jeopardy, the Supreme Court of Kentucky Has Misapplied the Facts of This Case to the Law Under the Controlling Decision of *Blockburger* v. *United States*, 284 U. S. 299, 52 S. Ct. 180, 76 L. Ed. 306 (1932).**

In an opinion rendered August 31, 1983, styled *Vondle Lee Hamilton* v. *Commonwealth of Kentucky* (No. 82-SC-671-MR), *To Be Published,* Ky., 659 S. W. 2d 201 (1983), the Supreme Court of Kentucky ruled that it violated the constitutional prohibition against double jeopardy to impose sentences of both rape and incest on the respondent from a single act of sexual intercourse committed by the respondent on his ten (10) year old daughter. *Hamilton* v. *Commonwealth, supra* (see Appendix at 2a).

In applying the test as expressed in *Blockburger* v. *United States,* 284 U. S. 299, 52 S. Ct. 180, 76 L. Ed. 306 (1932), the Supreme Court of Kentucky in its majority opinion made the following observation:

> However, the *Blockburger* test is not applied in the abstract, so that we merely look at the statute standing alone. The test must be applied subjectively. When we view the present case, we find that the proof utilized to convict the appellant of rape was that he had sexual intercourse with a ten year old child who was, in actuality, his daughter. The only additional fact — the relationship of father/daughter — was required in the incest charge. Thus, in a sense, the additional fact was not present in 'each' case, as required by *Blockburger,* but in only one case.
>
> *Hamilton* v. *Commonwealth, supra.* (See Appendix at 3a).

The petitioner respectfully submits that the majority opinion has misapplied the *Blockburger* test to the facts in the case at bar. Furthermore the petitioner submits that the Kentucky legislature has prohibited two different crimes and that the policy behind both statutes is distinct. To this extent, the double jeopardy clause does not prohibit conviction of both rape and incest under the facts of the case at bar.

In *Blockburger,* the United States Supreme Court stressed the following as it pertains to this issue:

> The applicable rule is that where the same act or transaction constitutes a violation of two distinct provisions, the test to be applied to determine whether there are two offenses or only one is whether each provision requires proof of a fact which the other does not. 284 U. S. 299 at 304.

Two offenses are "the same" under the double jeopardy clause of the federal constitution unless each

requires proof of an additional fact that the other does not. *Brown* v. *Ohio,* 432 U. S. 161, 97 S. Ct. 2221, 53 L. Ed. 2d 187 (1977).

In the case at bar the respondent was indicted for having violated Kentucky Revised Statute, hereinafter "KRS", 510.040(1) which specifically defines the offense of rape in the first degree as follows:

> (1) A person is guilty of rape in the first degree when:
>
> (a) He engages in sexual intercourse with another person by forcible compulsion; or
>
> (b) He engages in sexual intercourse with another person who is incapable of consent because he:
>
> (1) Is physically helpless; or
>
> (2) Is less than twelve (12) years old.

(See Appendix at 14a.)

As it pertains to this charge, the jury was instructed as follows:

> You will find the defendant guilty under this instruction if, and only if, you believe from the evidence beyond a reasonable doubt all of the following:
>
> (1a) That in this county on a date uncertain in 1981 and before the finding of the indictment herein, he engaged in sexual intercourse with Sue Ann Hamilton; and
>
> (1b) That at the time of such intercourse, Sue Ann Hamilton was under the age of 12 years.

The respondent was also charged with having violated KRS 530.020 which specifically defines the crime of incest as follows:

> (1) A person is guilty of incest when he has sexual intercourse with a person whom he knows to be an ancestor, descendant, brother or sister. The relationships referred to herein include blood relationships of either the whole or half-blood without regard to legitimacy, relationship of parent and child by adoption, and relationship of stepparent and stepchild.
>
> (See Appendix at 14a.)

As it pertains to this particular charge, the jury was instructed as follows:

> Incest — You will find the defendant guilty under this instruction if and only if, you believe from the evidence beyond a reasonable doubt all of the following:
>
> (a) That in this county on a date uncertain in 1981, and before the finding of the indictment herein, he engaged in sexual intercourse with Sue Ann Hamilton;
>
> (b) That Sue Ann Hamilton was his daughter; and
>
> (c) That he knew she was his daughter.

From the foregoing, it is clear that the offense of incest requires proof of a different fact than does the offense of rape and that the offense of rape requires proof of a different fact than does the offense of incest. In particular, in order to prove incest not only did the

petitioner have to prove that the respondent engaged in sexual intercourse with Sue Ann Hamilton, but the petitioner also needed to prove that Sue Ann Hamilton was the respondent's daughter and that he knew she was his daughter. Moreover, unlike the incest charge, in order to prove that the respondent committed the offense of first degree rape, the petitioner not only had to prove that the respondent engaged in sexual intercourse with Sue Ann Hamilton but also had to prove that Sue Ann at the time of the sexual intercourse was under the age of 12 years. To this extent, since each offense required proof of an element not required by the other offense, the respondent was not placed in double jeopardy when the petitioner received convictions under both statutes. See *Whalen* v. *United States,* 445 U. S. 684, 63 L. Ed. 2d 715, 100 S. Ct. 1432 (1980), where this Court recognized that the dispositive question was whether Congress authorized cumulative punishments for rape and for an unintentional killing committed in the course of the rape.

In Roberson, *Kentucky Criminal Law and Procedure,* 2nd edition, sec. 139 (1927), it was noted that for purposes of an evaluation under the Double Jeopardy Clause, "the rule that a single act or transaction cannot be split into separate offenses does not apply, where a single act is common to two offenses, but each contains additional elements not common to the other . . ."

KRS 505.020(1) specifically states that when a single course of conduct of a defendant may establish the commission of more than one offense, he may be prose-

cuted for each offense. KRS 505.020 prohibits a defendant however from being convicted of more than one offense when (a) one offense is included in the other or (b) inconsistent findings of fact are required to establish the commission of the offenses or (c) the offense is designed to prohibit a continuing course of conduct and the defendant's course of conduct was uninterrupted by legal process unless the law expressly provides that specific periods of such conduct constitute separate offenses (see Appendix 14a-15a).

It is clear that the exceptions to KRS 505.020(1), as delineated in KRS 505.020(1)(a)(b) and (c) do not apply in the case at bar. Justice Wintersheimer of the Supreme Court of Kentucky, in his dissent to the majority opinion in the case at bar, specifically noted this fact. *Hamilton* v. *Commonwealth, supra* (see Appendix 9a). In particular, incest is not a degree of the crime of rape and rape is not a degree of the crime of incest. *Burdue* v. *Commonwealth,* 144 Ky. 428, 138 S. W. 296 (1911); *Breeding* v. *Commonwealth,* 191 Ky. 128, 229 S. W. 372 (1921). Moreover in Roberson, *Kentucky Criminal Law and Procedure,* sec. 145 (1927), it was stressed that, *"a conviction or acquittal of rape does not bar a prosecution for incest, because incest is not a degree of the crime of rape"* (Emphasis added).

Applying the above to the case at bar, it is clear that the offenses of rape and incest are clearly separate offenses and that one offense is *not* a degree of the other. Moreover, each offense requires proof of an underlying fact that the other does not. To this extent,

the respondent's convictions of rape and incest in the case at bar do not violate the Double Jeopardy Clause of the United States Constitution.

Justice Aker of the Supreme Court of Kentucky, in his dissent to the majority opinion, correctly notes that, "while both rape and incest each requires proof of sexual intercourse, each requires proof of an additional fact which the other does not. The rape herein requires proof that the partner was under twelve; incest requires proof of a family relationship." *Hamilton* v. *Commonwealth, supra* (see Appendix at 6a).

Other state courts have addressed this issue and have held that double jeopardy does not apply in similar situations. In *State* v. *Martin,* Tenn. Cr. App., 634 S. W. 2d 639 (1982), a defendant was convicted of first degree sexual conduct on two counts of violating Chapter 937, House Bill Number 356, Tennessee Public Acts of 1978. Section 3(A)(1) of that Act defined first degree sexual conduct as the sexual penetration of the body of another when the victim is 12 years of age or under. Section 3(A)(3) provided that one is also guilty of this offense when a weapon is used to force or coerce the victim to engage in sexual penetration. Conduct proscribed in both subsection (A)(1) and (3) existed in the case. The incest statute, on the other hand, proscribed the marriage or the having of carnal knowledge with certain relatives, including a man's wife's daughter.

The Court in *State* v. *Martin, supra,* stressed that the sexual conduct statute and the incest statute created separate and distinct offenses. The court further

stressed that neither offense was included in the other and that either offense may be committed without committing the other. The court then noted that, "relying on the *Blockburger* test, we find that each of these offenses requires proof of different elements . . ." See also *State ex rel. Lawrence* v. *Burke,* 253 Wisc. 240, 33 N. W. 2d 242 (1948), where the court noted that, "although the testimony might show that by the same acts he (defendant) transgressed the law yet the offenses (rape and incest) are distinct and each requires a different character of proof.

It should also be pointed out that the legislative policy behind the rape statute and incest statute in Kentucky is different. As Justice Aker of the Supreme Court of Kentucky again correctly stresses in his dissent:

> . . . The rape statute seeks to deter and punish those who would have intercourse with children incapable of consent. The incest statute seeks to deter and punish those who would have intercourse with close members of their family.
>
> *Hamilton* v. *Commonwealth, supra* (Appendix at 7a).

As Justice Wintersheimer of the Supreme Court of Kentucky astutely stresses in his dissent:

> Two laws have been violated by the appellant. Two penalties should be imposed. . . .
>
> *Hamilton* v. *Commonwealth, supra* (Appendix at 8a).

In *Albernaz* v. *United States,* 450 U. S. 333, 101 S. Ct. 1137, 67 L. Ed. 2d 275 (1981), the United States Supreme Court was confronted with whether the imposition of consecutive sentences for separate offenses which contained separate penalty provisions was permissible. The court in *Albernaz* held that the two statutes were directed at separate evils. The court in *Albernaz* specifically noted that the "dispositive question" was:

> whether Congress intended to authorize separate punishments for the two crimes . . . This is so because the power to define criminal offenses and to prescribe punishments to be imposed upon those found guilty of them, resides wholly with the Congress.
>
> *Id.,* 101 S. Ct. at 1145.

The court in *Albernaz, supra,* concluded by stressing that where Congress intended, as it did here, to impose mutliple punishments, imposition of such sentences did not violate the Constitution. See also *Missouri* v. *Hunter,* 74 L. Ed. 2d 535, 103 S. Ct. 673 (1983).

It is abundantly clear that Kentucky's legislature intended that the crimes of rape and incest be separate and distinct and also intended that a conviction of one does *not* necessarily preclude conviction of the other where the facts are present to support a conviction for both offenses. As has been noted earlier, the policy behind Kentucky's statutes defining rape and incest is indeed distinct. This can be demonstrated from the mere fact that KRS 510.040 (Rape) is found within

Chapter 510 of the Kentucky Revised Statutes defining sexual offenses while KRS 530.020 (Incest) can be found within Chapter 530 of the Kentucky Revised Statutes defining family offenses.

One final point should be mentioned. The majority opinion of the Supreme Court of Kentucky in comparing the crimes of rape and incest, incorrectly analyzes the above two offenses when it stresses that, "Thus in a sense the additional fact was not present in 'each' case as required by *Blockburger* but in only one case." *Hamilton* v. *Commonwealth, supra* (Appendix at 3a). In particular, by using such language, this Court seems to incorrectly imply that one offense is a lesser included offense of the other offense. This position is strengthened by the fact that the majority opinion cites the United States Supreme Court case of *Harris* v. *Oklahoma,* 433 U. S. 682, 97 S. Ct. 2912, 53 L. Ed. 2d 1054 (1977), as the case "of nearest analogy." *Hamilton* v. *Commonwealth, supra* (Appendix at 3a).

The petitioner argues that *Harris* v. *Oklahoma, supra,* is simply not applicable to the facts in the case at bar. In *Harris Id.,* this Court said "When, as here, conviction of a greater crime, murder, cannot be had without conviction of the lesser crime, robbery with firearms, the Double Jeopardy Clause bars prosecution for the lesser crime after conviction of the greater one." 433 U. S. at 682. This is simply not the situation however in the case at bar.

From the above, it is clear that the double jeopardy clause of the United States Constitution was not

violated when the respondent was convicted of both rape and incest in the case at bar. This Court should grant the petitioner's application for writ of certiorari in order to decide this important federal question.

## CONCLUSION

For the foregoing reasons, the petitioner, the Commonwealth of Kentucky. respectfully requests that its petition for writ of certiorari of the Opinion of the Supreme Court of Kentucky be granted to the extent that said opinion reverses and remands the respondent's incest conviction.

Respectfully submitted,

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**PROOF OF SERVICE**

I, George M. Geoghegan, Jr., counsel of record for petitioner, hereby certify that three (3) copies of the foregoing Petition for Writ of Certiorari were mailed by United States mail, with first class postage prepaid, to Hon. Paul F. Isaacs, Public Advocate, and Hon. Timothy Riddell, Assistant Public Advocate, Third Floor, State Office Building Annex, Frankfort, Kentucky 40601, Counsel for Respondent, and that all parties required to be served have been served, all on this January 20th, 1984.

George M. Geoghegan Jr.

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*Assistant Deputy Attorney General*
*Counsel of Record for Petitioner*

# Appendix

RENDERED: AUGUST 31, 1983
TO BE PUBLISHED

# SUPREME COURT OF KENTUCKY

**No. 82-SC-671-MR**

---

VONDLE LEE HAMILTON - - - - - - *Appellant*

*v.*

COMMONWEALTH OF KENTUCKY - - - *Appellee*

---

*Appeal from Pike Circuit Court*
*Honorable Reed D. Anderson, Judge*
*No. 81-CR-132*

---

## OPINION OF THE COURT BY JUSTICE GANT— AFFIRMING IN PART; REVERSING IN PART AND REMANDING

Appellant and his wife, Pauline, were tried jointly for the crimes of rape and incest, emanating from a sexual intercourse by appellant upon their ten-year-old daughter. Appellant was found guilty and sentenced to life imprisonment for the rape, and ten years for incest, sentences to be served concurrently. Three errors are asserted on this appeal.

Appellant first contends that the introduction of evidence by the wife, during their joint trial, by which she sought to prove that she was a battered spouse and thus so frightened of her husband that she acceded to his demands, constituted evidence of other nonrelated offenses, thereby denying appellant a fair trial. This argument is without merit. There was no motion for separate trials filed herein,

pursuant to RCr 9.16; nor was there any contemporaneous objection made to the evidence as it was adduced, thus not preserving any alleged errors for our consideration. *Huff* v. *Commonwealth,* Ky., 560 S. W. 2d 544 (1977). Appellant participated in cross-examination concerning this alleged abuse, and even testified himself concerning at least one incident, thus effectively waiving any objection to that evidence. *Oney* v. *Commonwealth,* 225 Ky. 590, 9 S. W. 2d 723 (1928).

Appellant next argues prejudicial error because the clerk, in calling the docket for the day and before the jury was even called or empaneled, read loud that appellant was charged with "rape and persistent felony offender." The record contains no evidence that this occurred and, even assuming it did occur, there is no evidentiary record that it was heard or noted by the jury or that there was any influence on the verdict resulting therefrom. This argument, based upon the record before us, is also without merit.

The third error brought before us is apparently one of first impression. Appellant was convicted in this instance for *both* rape and incest resulting from a single act of sexual intercourse with his ten 10-year-old daughter. Appellant contends that to permit the jury to impose both sentences for this single act constitutes violation of his constitutional guarantee against double jeopardy. We agree.

The standard rule for determination of whether two offenses are sufficiently distinguishable to permit the imposition of cumulative punishment was stated in *Blockburger* v. *United States,* 284 U. S. 299, 304, 52 S. Ct. 180, 182, 76 L. Ed. 306, 309 (1932):

> The applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each pro-

> vision requires proof of a fact which the other does not. . . .

However, the *Blockburger* test is not applied in the abstract, so that we merely look at the statute standing alone. The test must be applied subjectively. When we view the present case, we find that the proof utilized to convict the appellant of rape was that he had sexual intercourse with a ten-year-old child, who was, in actuality, his daughter. The only additional fact—the relationship of farther/daughter—was required in the incest charge. Thus, in a sense, the additional fact was not present in "each" case, as required by *Blockburger,* but in only one case.

Of nearest analogy is the case of *Harris* v. *Oklahoma* 433 U. S. 682, 97 S. Ct. 2912, 53 L. Ed. 2d 1054 (1977). In that case, Harris, had been tried and convicted of the felony murder of a grocery clerk. The state then sought to try him for the armed robbery of the store. Armed robbery, of course, was a separate offense, and not an included offense, to a murder charge, just as incest is a separate offense and not an included offense to the charge of rape. *See Breeding* v. *Commonwealth,* 191 Ky. 128, 229 S. W. 372 (1921), and *Burdue* v. *Commonwealth,* 144 Ky. 428, 138 S. W. 296 (1911). In holding that the second prosecution was barred by the Double Jeopardy Clause, the court held that the ingredients of the lesser offense were necessary to prove the greater offense, thus constituting two trials for the same incident. The court quoted *In re Nielsen,* 131 U. S. 176, 9 S. Ct. 672, 33 L. Ed. 118 (1889), as follows:

> [A] person [who] has been tried and convicted for a crime which has various incidents included in it, . . . cannot be a second time tried for one of those incidents without being twice put in jeopardy for the same offense.

That part of the judgment finding the appellant herein guilty of the crime of rape and sentencing him to life imprisonment therefor is affirmed. That part of the judgment finding the appellant guilty of incest is reversed, and this case is remanded to the lower court with directions to set aside the incest conviction.

All concur except Aker and Wintersheimer, JJ., who dissent and file herewith separate dissenting opinions.

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RENDERED: AUGUST 31, 1983
TO BE PUBLISHED

# SUPREME COURT OF KENTUCKY

**No. 82-SC-671-MR**

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VONDLE LEE HAMILTON - - - - - - *Appellant*

*v.*

COMMONWEALTH OF KENTUCKY - - - *Appellee*

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*Appeal from Pike Circuit Court*
*Honorable Reed D. Anderson, Judge*
*No. 81-CR-132*

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## DISSENTING OPINION BY JUSTICE AKER

I must dissent from that portion of the majority opinion which reverses the appellant's conviction for incest. The majority contends that conviction for both rape and incest violates the constitutional prohibition against double jeopardy. I respectfully disagree.

As the majority correctly points out, the standard for determining this issue was stated in *Blockburger* v. *United States*, 284 U. S. 299, 304.

> The applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not. . . .

Where the majority opinion goes astray is in its insistence that this rule is somehow something more than a

rule of statutory construction. It is not. The majority opinion appears to suggest that conviction for both offenses is prohibited because both crimes were committed by the same act, and thus would involve substantially the same "proof" at trial.

This reasoning ignores the language of *Blockburger, supra*, upon which the majority purports to rely. The rule does not say conviction of two separate offenses for the same act is prohibited, but instead, the rule is designed to determine *when* conviction of two offenses for the same act is prohibited. Conviction of two offenses is not prohibited where "each provision requires proof of a fact which the other does not." The "facts" referred to are the elements of the statutory provisions.

In this case it is clear that "each provision requires proof of a fact which the other does not." Rape, as defined in KRS 510.040 and as applied to this case, requires proof of (1) sexual intercourse, (2) with one who is less than twelve years old. Incest, as defined in KRS 530.020, requires proof of (1) sexual intercourse, (2) with certain members of one's family (in this case the appellant's daughter). While both rape and incest each require proof of sexual intercourse, each requires proof of an additional fact which the other does not. The rape herein requires proof that the partner was under twelve; incest requires proof of a family relationship.

The majority's reliance on *Harris* v. *Oklahoma*, 437 U. S. 682, is likewise unpersuasive. Under the felony murder statute involved in that case, conviction of felony murder required proof of the underlying felony. Obviously then, the underlying felony was a "lesser-included offense" of felony murder in the sense that conviction for felony murder required proof of *every* element of the felony. Conviction for the felony did not require proof of a fact not required for conviction of felony murder.

I am of the opinion that conviction for both rape and incest under the facts of this case do not violate the constitutional prohibition against double jeopardy. The policy behind each statute is distinct. The rape statute seeks to deter and punish those who would have intercourse with children incapable of consent. The incest statute seeks to deter and punish those who would have intercourse with close members of their family. That the appellant committed both crimes by the same act is of no constitutional significance.

I would affirm the judgment of the lower court in all respects.

# SUPREME COURT OF KENTUCKY

**No. 82-SC-671-MR**

---

VONDLE LEE HAMILTON - - - - - *Appellant*

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COMMONWEALTH OF KENTUCKY - - - *Appellee*

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*Appeal from Pike Circuit Court*
*Honorable Reed D. Anderson, Judge*
*No. 81-CR-132*

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## DISSENTING OPINION BY JUSTICE WINTERSHEIMER

I respectfully dissent from that part of the majority opinion which reverses the conviction for incest because the conviction for both rape and incest does not constitute double jeopardy. Two laws have been violated by the appellant. Two penalties should be imposed. No prejudice results because he is to serve both sentences concurrently. A life sentence only means that he will be eligible for parole in less than eight years.

The legislature has prohibited two different crimes. Consequently, there is no logical reason why he is prejudiced by imposing two penalties.

Child abuse by means of the illegal sexual conduct of incest is not a lesser-included offense of the crime of rape. There are two separate laws which have been violated. The majority decision severely limits prosecutors in charging those who abuse female children. It creates a new technical defense and gives an unneeded advantage to those

who break the law. The trial court did not err and did not violate the appellant's constitutional guarantee against double jeopardy as well as his right to be free of multiple prosecutions by permitting a conviction of incest as well as rape.

The crime of incest denounced by KRS 510.040 requires proof of a different fact than does the offense of rape, and rape requires different proof from incest. A conviction for incest requires a showing of sexual contact within a proscribed degree of blood relationship, and there is no requirement that forcible compulsion be shown. On the other hand, blood relationship is irrelevant for a rape conviction but forcible compulsion is a required element. Incest is not a degree of the crime of rape, and rape is not a degree of the crime of incest.

The majority totally misinterprets the case of *Blockburger* v. *United States*, 284 U. S. 299, 304, 52 S. Ct. 180, 76 L. Ed. 306 (1932). Two offenses are the same under the double jeopardy clause of the Federal Constitution, unless each requires proof of an additional fact that the other does not. *Brown* v. *Ohio*, 432 U. S. 161, 97 S. Ct. 2221, 53 L. Ed. 2d 187 (1977). Here the offenses of rape and incest are clearly separate and one is not a lesser-included offense of the other. Each offense requires proof of a fact that the other does not. The appellant's conviction of rape and incest did not violate the double jeopardy prohibition. The majority opinion is a significant departure from existing case law.

The majority opinion ignores the legislative mandate of KRS 505.020, which states that where a single course of criminal conduct establishes the commission of more than one offense, the accused may be prosecuted for each offense. The exceptions as set out in KRS 505.020(1)(a), (b) and (c) do not apply here. The citations of authority and their interpretation by the majority are not persuasive.

The criminal conduct of the appellant compounded the convictions. He cannot legitimately claim the protection of constitutional double jeopardy. There is no manifest injustice or constitutional infirmity in the conviction for both incest and rape.

I would affirm the conviction in all respects.

# SUPREME COURT OF KENTUCKY

**82-SC-671-MR**

---

VONDLE LEE HAMILTON - - - - - - *Appellant*

*v.*

COMMONWEALTH OF KENTUCKY - - - *Appellee*

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*Appeal from Pike Circuit Court*
*Honorable Reed D. Anderson, Judge*
*No. 81-CR-143*

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## ORDER DENYING PETITION FOR REHEARING

The appellee's petition for rehearing is denied.

Stephens, C. J., and Aker, Gant, Leibson, Stephenson and Vance, JJ., concur; Wintersheimer, J., not concurring.

Entered November 23, 1983.

(s) Robert F. Stephens
Chief Justice

**AMENDMENT V—CAPITAL CRIMES; DOUBLE JEOPARDY; SELF-INCRIMINATION; DUE PROCESS; JUST COMPENSATION FOR PROPERTY**

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indicement of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

**AMENDMENT XIV—CITIZENSHIP; PRIVILEGES AND IMMUNITIES; DUE PROCESS; EQUAL PROTECTION; APPORTIONMENT OF REPRESENTATION; DISQUALIFICATION OF OFFICERS; PUBLIC DEBT; ENFORCEMENT**

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at

any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and cititzens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

KENTUCKY PENAL CODE

**510.040. Rape in the first degree.**—(1) A person is guilty of rape in the first degree when:

(a) He engages in sexual intercourse with another person by forcible compulsion; or

(b) He engages in sexual intercourse with another person who in incapable of consent because he:

1. Is physically helpless; or

2. Is less then twelve (12) years old.

(2) Rape in the first degree is a Class B felony unless the victim is under twelve (12) years old or receives a serious physical injury in which case it is a Class A felony. (Enact. Acts 1974, ch. 406, § 84.)

**530.020. Incest.**—(1) A person is guilty of incest when he has sexual intercourse with a person whom he knows to be an ancestor, descendant, brother or sister. The relationships referred to herein include blood relationships of either the whole or halfblood without regard to legitimacy, relationship of parent and child by adoption, and relationship of stepparent and stepchild.

(2) Incest is a Class C felony. (Enact. Acts 1974, ch. 406, § 258.)

**505.020. Prosecution for multiple offenses.**—(1) When a single course of conduct of a defendant may establish the commission of more than one offense, he may be prosecuted for each such offense. He may not, however, be convicted of more than one offense when:

(a) One offense is included in the other, as defined in subsection (2); or

(b) Inconsistent findings of fact are required to establish the commission of the offenses; or

(c) The offense is designed to prohibit a continuing course of conduct and the defendant's course of conduct was uninterrupted by legal process, unless the law expressly provides that specific periods of such conduct constitute separate offenses.

(2) A defendant may be convicted of an offense that is included in any offense with which he is formally charged. An offense is so included when:

(a) It is established by proof of the same or less than all the facts required to establish the commission of the offense charged; or

(b) It consists of an attempt to commit the offense or to commit an offense otherwise included therein; or

(c) It differs from the offense charged in the respect that a lesser kind of culpability suffices to establish its commission; or

(d) It differs from the offense charged only in the respect that a less serious injury or risk of injury to the same person, property or public interest suffices to establish its commission. (Enact. Acts 1974, ch. 406, § 44.)